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Attorney for Intrax Group, Inc.
and Michael Mak

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

MICROSOFT CORPORATION
a Washington corporation,

Plaintiff,

v.

INTRAX GROUP, INC., D/B/A
SURPLUS COMPUTERS, a California
corporation; MICHAEL MAK, an
individual and JOHN DOES 1-5

Defendants

CASE NO. 07-cv-01840 EMC

**ANSWER TO COMPLAINT
FOR DAMAGES AND INJUNCTIVE
RELIEF**

(JURY TRIAL DEMANDED)

Defendants INTRAX GROUP, INC. (Intrax) and MICHAEL MAK respond to the
identically-numbered allegations of the complaint on file in this action as follows:

1. Defendants admit that this action is for the claims stated. Otherwise, denied.
2. Defendants lack sufficient information on which to determine the truth of this allegation and deny it on that basis.
3. Defendants admit all allegations herein except that Microsoft has suffered any damage or that Intrax has engaged in wrongful conduct, which are denied.
4. Defendants admit that Mak is a resident of Santa Clara county California. Otherwise, defendants lack sufficient information to determine the truth of this allegation and deny it on that basis.

1 5. Defendants deny that they have conspired or engaged in any wrongful conduct or that they
2 are responsible for damage to Microsoft. Defendants lack sufficient information to determine the
3 truth of the remainder of this allegation and deny it on that basis.

4 6. Defendants lack sufficient information to determine the truth of this allegation and deny
5 it on that basis

6 7. Defendants admit that this matter concerns citizens of two states. Defendants lack
7 sufficient information to determine the truth of the remainder of this allegation and deny it on that
8 basis

9 8. Defendants admit that one or more of them reside in and may be found in this District.
10 They deny that they engaged in any infringement or other wrongful conduct. Defendants lack
11 sufficient information to determine the truth of the remainder of this allegation and deny it on that
12 basis

13 **INTRADISTRICT ASSIGNMENT**

14 9. Defendants admit that rule 3-2(c) permits the assignment of this matter on a district-wide
15 basis, and they admit that the defendants have their principal place of business and/or residences in
16 this Division. Defendants find San Francisco is more convenient for defendants, who would prefer
17 the matter remain in San Francisco. Defendants' counsel is based in San Francisco. Plaintiff's
18 counsel is in San Mateo, while co-counsel is in Seattle, WA. Therefore, San Francisco is no less
19 convenient for them.

20 10. Defendants lack sufficient information to determine the truth of these allegations and
21 deny them on that basis.

22 11. Defendants admit that Microsoft distributes software. Defendants lack sufficient
23 information to determine the truth of this allegation and deny it on that basis.

24 12. Defendants lack sufficient information to determine the truth of these allegations and
25 deny them on that basis.

26 13. Defendants lack sufficient information to determine the truth of these allegations and
27 deny them on that basis.

1 14. Defendants admit that Microsoft publishes a product known as Windows XP as an
2 operating system. Otherwise, Defendants lack sufficient information to determine the truth of these
3 allegations and deny them on that basis.

4 15. (a-e). Defendants admit that Microsoft publishes a product known as Microsoft Office
5 2003, and that it is a suite of programs. Otherwise, Defendants lack sufficient information to
6 determine the truth of these allegations and deny them on that basis.

7
8 **DEFENDANTS' INFRINGEMENT**

9 16. Denied.

10 17. Defendants lack sufficient information to determine the truth of this allegation and deny
11 it on that basis.

12 18. Defendants lack sufficient information to determine the truth of these allegations and
13 deny them on that basis.

14 19. Defendants lack sufficient information to determine the truth of these allegations and
15 deny them on that basis.

16 20. Defendants lack sufficient information to determine the truth of these allegations and
17 deny them on that basis.

18 21. Defendants lack sufficient information to determine the truth of these allegations and
19 deny them on that basis.

20 22. Defendants lack sufficient information to determine the truth of these allegations and
21 deny them on that basis.

22 23. Defendants deny there was any infringement or illegal practices by them. Otherwise,
23 Defendants lack sufficient information to determine the truth of these allegations and deny them on
24 that basis.

25 24. Defendants lack sufficient information to determine the truth of these allegations and
26 deny them on that basis.

27 25. Defendants deny that they have violated the rights of Microsoft, and further deny that any
28

1 violations were willful or deliberate or that their actions have harmed Microsoft. Otherwise,
2 Defendants lack sufficient information to determine the truth of these allegations and deny them on
3 that basis.

4 **CLAIM 1**

5 **(Copyright Infringement, 17 U.S.C. §501, et seq.)**

6 26. Defendants incorporate their responses to each of the allegations above.

7 27. Defendants lack sufficient information to determine the truth of these allegations and
8 deny them on that basis.

9 28. Denied.

10 29. Denied.

11 30. Denied.

12 31. Denied.

13 32. Denied.

14 33. Denied.

15 **CLAIM II**

16 **(Infringing Importation of Copyrighted Works, 17 U.S.C. §602)**

17 34. Defendants incorporate their responses to each of the allegations above.

18 35. Defendants lack sufficient information to determine the truth of these allegations and
19 deny them on that basis.

20 36. Denied.

21 37. Denied.

22 38. Denied.

23 39. Denied.

24 40. Denied.

25 41. Denied.

1 **CLAIM III**

2 **(Accounting)**

3 42. Defendants lack sufficient information to determine the truth of these allegations and
4 deny them on that basis.

5 43. Denied.

6 44. Defendants lack sufficient information to determine the truth of these allegations and
7 deny them on that basis.

8
9 **AFFIRMATIVE DEFENSES**

10 As affirmative defenses, these defendants allege as follows:

11 **FIRST AFFIRMATIVE DEFENSE**

12 1. Plaintiff has failed to state a claim on which relief can be granted in this case.

13 **SECOND AFFIRMATIVE DEFENSE**

14 2. Plaintiff is not entitled to any recovery in this matter because of plaintiff's failure to
15 mitigate its damages in this matter.

16 **THIRD AFFIRMATIVE DEFENSE**

17 3. Plaintiff is estopped from recovering in this matter due to its wrongful conduct. Plaintiff
18 has known that its dealers and distributors were selling their product in a manner that Plaintiff now
19 alleges is in violation of its rights, such as sales of educational product to buyers who do not meet
20 Plaintiff's alleged qualifications. As a result, Plaintiff is estopped from asserting these claims
21 against these defendants.

22 **FOURTH AFFIRMATIVE DEFENSE**

23 4. Plaintiff is barred from recovery herein pursuant to its initial sale of the products under
24 the first sale doctrine.

25 **FIFTH AFFIRMATIVE DEFENSE**

26 5. Plaintiff is not entitled to any recovery in this matter due to its acquiescence in the
27 activities of the defendants and others. Plaintiff's marks have been in open and continuous use by

1 the defendants and others known to the defendants prior to the filing of this action. Plaintiff has
2 known that its dealers and distributors were selling their product in a manner that Plaintiff now
3 alleges is in violation of its rights, such as sales of their products to buyers who do not meet the
4 alleged qualifications, for educational product and other types. Despite this knowledge, Plaintiff has
5 taken no action. Moreover, Plaintiff has made some of these sales itself, while maintaining falsely
6 that nothing of this kind takes place. Plaintiff has chosen to look the other way and allow the
7 practice.

8 Defendants have relied to their detriment on plaintiff's acquiescence and delay in continuing
9 to use plaintiff's marks and in its other actions. Plaintiff is therefore barred from any recovery herein
10 and is not entitled to allege that any acts of defendants are an infringement of plaintiff's rights.

11 SIXTH AFFIRMATIVE DEFENSE

12 6. Plaintiff is not entitled to any recovery in this matter due to its unreasonable delay under
13 the doctrine of laches.

14 SEVENTH AFFIRMATIVE DEFENSE

15 7. Plaintiff is not entitled to any recovery in this matter because its actions released the
16 Defendants from any liability for the alleged actions..

17 EIGHTH AFFIRMATIVE DEFENSE

18 8. Plaintiff is not entitled to any recovery in this matter because by its actions, it has waived
19 any right to do so.

20 NINTH AFFIRMATIVE DEFENSE

21 9. Plaintiff is not entitled to any recovery in this matter because defendants' use constitutes
22 a fair use of these marks in question.

23 TENTH AFFIRMATIVE DEFENSE

24 10. Plaintiff is barred from making these claims pursuant to the applicable statutes of
25 limitation including 17 U.S.C. 507.

26 ELEVENTH AFFIRMATIVE DEFENSE

27 11. Plaintiff is not entitled to any recovery in this matter because of plaintiff's unclean hands.

1 Among other matters, plaintiff has engaged in the same practices itself, or known of similar actions
2 by various third parties, yet chosen to keep selling product to these resellers and let them continue
3 to act in this manner in order to maximize their profits.

4
5 WHEREFORE, Defendants pray:

- 6 1. That Plaintiff take nothing by way of this action;
7 2. For judgment in favor of defendants and each of them;
8 3. For costs of suit and attorney fees according to proof; and
9 4. For such other and further relief as the court deems just and proper.

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17 Law Offices of Steven Dillick

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19 Date: June 4, 2007

/s/ Steven A. Dillick

PROOF OF SERVICE

I, Steven A. Dillick, hereby declare that I am over the age of eighteen years and not a party to the within action. My business address is One Maritime Plaza, Suite 1040, San Francisco, CA 94111. On the date indicated below, I served the following documents on the party(s) listed below:

Documents: Answer to complaint

Parties Served:

Paul J. Andre
Esha Bandyopadhyay
Perkins Coie LLP
101 Jefferson Dr.
Menlo Park, CA 94025-1114

Scott T. Wilsdon
Jeremy E. Roller
Yarmuth, Wilsdon, Calfo, PLLC
925 Fourth Ave.
Suite 2500
Seattle, Washington 98104

Method of service:

☒ [X] placing a true copy in a sealed envelope with postage fully prepaid for collection and mailing on the date and at the address shown herein in the ordinary course of business.

☐ [] by having a messenger personally deliver a true copy thereof in a sealed envelope. The messenger was from Quicksilver in San Francisco.

☐ [] by facsimile transmission

Executed on the date set forth below at San Francisco, California. I declare under penalty of perjury that the foregoing is true and correct.

June 4, 2007

/s/ Steven A. Dillick